

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.N.KRISHNAN

FRIDAY, THE 16TH NOVEMBER 2007 / 25TH KARTHIKA 1929

WP(C).No. 22018 of 2007(U)

OS.271/1990 of PRINCIPAL SUB COURT, PALAKKAD
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PETITIONER:

1. K.V.PADMINI, W/O VENUGOPAL,
VALOOR THODI, MANKURISSI, PALAKKAD.
2. LAKSHMANAN, S/O VELAYUDHAN,
KAKKAYAMKOTTIL, KONGAD, PALAKKAD.
3. ACHAPPAN, S/O VELU,
KAKKAYAMKOTTIL, KONGAD, PALAKKAD TALUK.
4. RAMANKUTTY, S/O VELU,
KAKKAYAMKOTTIL, KONGAD, PALAKKAD TALUK.
5. VALLIKUTTY, W/O K.BALAN,
MAMBULLIPURA, PULIYAMPULLY,
MUNDUR AMSOM, PALAKKAD TALUK.
6. PADMAVATHY, W/O SANKARA NARAYANAN,
KAKKAYAMKOTTIL, KONGAD, PALAKKAD TALUK.
7. PRASANNA, D/O SANKARANARAYANAN,
KAKKAYAMKOTTIL, KONGAD, PALAKKAD TALUK.
8. PRASEETHA, D/O SANKARANARAYAN,
KAKKAYAMKOTTIL, KONGAD AMSOM,
PALAKKAD TALUK.
9. RAJU, S/O SANKARANARAYANAN,
KAKKAYAMKOTTIL, KONGAD AMSOM,
PALAKKAD TALUK.
10. UNNI, S/O SANKARANARAYANAN,
KAKKAYAMKOTTIL, KONGAD AMSOM,
PALAKKAD TALUK.

BY ADV. SRI.P.N.KRISHNANKUTTY ACHAN(SR.)
SRI.K.MOHANAKANNAN

RESPONDENTS:

KRISHNANKUTTY, S/O PERINKULAM PADATH
SANKARAN, UMMANEZHI AMSOM, PULAPETTA,
OTTAPPALAM TALUK.

BY ADV. SRI.O.RAMACHANDRAN NAMBIAR
SRI.GEEN T.MATHEW

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD
ON 16/11/2007, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

PETITIONER'S EXTs:

EXT.P1: TRUE COPY OF THE PLAINT IN O.S. NO: 271/90 ON THE FILE OF THE COURT OF THE SUBORDINATE JUDGE, PALAKKAD

EXT.P2: -do- of THE AGREEMENT DT. 8.1.1990

EXT.P3: CERTIFIED COPY OF THE DECREE DT. 29.8.1993 IN O.S. NO: 271/1990 OIN THE FILES OF THE COURT OF THE SUBORDINATE JUDGE, PALAKKAD

EXT.P4: -DO- OF THE COMMISSIONER'S REPORT AND PLAN DT. 17.3.1995

EXT.P5: -DO- OF THE APPLICATION FILED BY THE RESPONDENT FOR IMPEADING

EXT.P6: -DO- OF THE ORDER DT. 30.6.2006 IN E.A. NO: 488/1996

EXT.P7: -DO- OF THE ORDER DT. 30.6.2006 IN E.A. NO: 63/2001

EXT.P8: -DO- OF THE JUDGMENT IN W.P(C) NO: 22261/2006 DT. 29.9.2006 OF THIS HON'BLE COURT

EXT.P9: -DO- OF THE APPLICATION IN E.A. NO: 8525/2006

EXT.P10: -DO- OF THE ORDER DT. 16.6.2007 IN E.A. NO: 825/2006

RESPONDENTS' EXTs:

EXT.R1: TRUE COPY OF COUNTER AFFIDAVIT

EXT.R1A: -DO- OF THE COMMISSION REPORT

EXT.R1B -DO- OF THE PLAN

EXT.R1C: -DO- OF THE SALE DEED NO: 736/1979 DT. 21/3/1979

EXT.R1D: -DO- OF THE SALE DEED NO: 85/1987 DT. 13/1/1987

EXT.R1E: -DO- NO: 1695 OF 1989 DT. 11/7/1989

EXT.R1F: -DO- OF THE SALE DEED DT. 7.2.2007

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/TRUE COPY/

P.A. TO JUDGE

M.N. KRISHNAN, J.

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W.P.C. NO. 22018 OF 2007

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Dated this the 16th day of November, 2007.

J U D G M E N T

This writ petition is filed seeking to set aside Ext.P10 order passed by the Addl. Sub Judge, Palakkad in E.A.825/06 in E.P.1/94. The petition is one to set aside the Commissioner's plan and report. The litigation, as appears, successfully completed the 2nd decade and even now the decree holder remains in the veranda of the Court for enjoying the fruits of the decree. The Court granted a decree in favour of the plaintiff in the suit by virtue of which he was found to be entitled to get assignment of 60 cents of land at the rate of Rs.3,000/- per cent less Rs.25,000/- already paid as advance. Thereafter, a Commissioner was appointed in the matter in the execution proceedings to demarcate the said 60 cents of land liable to be assigned in favour of the decree holder in the case. The Commissioner inspected the property and found that the judgment debtor is only having

right and possession over 94 and a quarter cents of property comprised in Sy.No.255/1B and he also specifically reported that the property comprised in Sy.No.257/3 is situated on the western side of the Konghad - Palakkad road and thereafter fixed the property that can be assigned as plot A having a measurement of 60 cents and left the balance property as plot B. Against this Commissioner's report the original decree holder filed a petition for setting aside on 22.1.96. It appears he died in the year 1999 and by virtue of Ext.P6 order, in the absence of any representation, the Court dismissed the said application. Thereafter, one of the legal representatives namely Padmini who is the first petitioner in Ext.P9 also moved an application for review of the said order which also ended in dismissal. Aggrieved by that decision the said Padmini filed a writ petition before this Court as WPC 22261/06 and this Court declined to exercise jurisdiction and dismissed the writ petition as well. The said writ petition was disposed on 29.9.06. Thereafter, the said Padmini along with others moved an application on 8-12-06 for setting aside the Commissioner's plan and report which also ended in dismissal by Ext.P10 order. It is pertinent to

refer that Padmini who has filed an application for review and which was dismissed and confirmed by the High Court is again the person who had sworn to the affidavit to set aside the Commissioner's plan and report. The Court below considered the matter, referred to the various orders passed by the Court and declined to set aside the Commissioner's plan and report. It is challenging that order the present writ petition is filed. The learned senior counsel in the writ petition would submit that the Court should have considered the objections filed by Sri. Velu which was the subject matter for setting aside the Commissioner's plan and report in the earlier instance. When a petition for setting aside the Commissioner's plan and report is filed it is incumbent upon the party to file affidavit or adduce evidence to show how it is incorrect. In the present application and even in the objection to the execution petition the contention appears to be that there is no such property for which a document can be executed and therefore it appears a denial in toto of the entire decree. The Commissioner appointed by the Court inspected the property with the assistance of the Village Officer measured the property and found that the total

property available is only 94 and quarter cents comprised in Sy.No.255/1B and found that 60 cents of property in one segment can be the subject matter of decree for specific performance and submitted a plan accordingly. It is a settled principle that when an application is filed for setting aside the Commissioner's report the parties who file an application must adduce evidence to show that how it is incorrect. The mere averments in an affidavit is not a substitute for proof. Here, in spite of shuttling between one Court to the other, none of the writ petitioners cared to mount the box to give evidence in support of their contentions nor did they take any steps to examine the Commissioner to prove how he had done it incorrectly. Mere statements in an application to set aside Commissioner's plan and report shall not be accepted unless it is supported by materials. Therefore, I do not find any mistake committed by the Court below in dismissing the application.

2. Further it is also to be held that Sri.K.V.Padmini who had filed the review application and who challenged the matter before the High Court is the person who had sworn to the affidavit. Subsequent to the dismissal of the matter by

the High Court she is precluded from filing the application because the order of the High Court remains unchallenged thereafter. So on legal principles also it is not a petition that can be entertained. In order to have a complete adjudication I have discussed the matter and I find that in the absence of any evidence even to the slightest satisfaction, the Court cannot interfere with the Commissioner's report and therefore the order impugned does not suffer from any infirmity or illegality and therefore I decline to exercise jurisdiction under Article 227 of the Constitution of India and dismiss the writ petition.

M.N. KRISHNAN, JUDGE.

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